



OFFICE OF THE ATTORNEY GENERAL - STATE OF TEXAS
JOHN CORNYN

January 22, 2001

Mr. Charles M. Allen, II
Legal Office
Richardson Police Department
City of Richardson
P.O. Box 831078
Richardson, Texas 75083-1078

OR2001-0223

Dear Mr. Allen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143358.

The City of Richardson (the "city") received a request for all records related to the arrest of a named individual which occurred on September 20, 1999, as well as the personnel files of three Richardson police officers. You inform us that you have released a portion of the requested information to the requestor, but claim that the remainder of the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

Section 552.103 is applicable only where the litigation involves or is expected to involve the governmental body claiming the exception. Open Records Decision Nos. 392 (1983), 132 (1976). You inform us that the named individual whose arrest records are being sought has a case that was set for trial on December 11, 2000. However, you have provided us no evidence that the *city* is or may be a party to the litigation to which you refer. Therefore, we conclude that section 552.103 may not properly be invoked to except the requested materials from public disclosure.

We will next address your argument under section 552.108(a) and (b). Section 552.108, the "law enforcement exception," provides:

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if: (1) release of the information would interfere with the detection, investigation or prosecution of crime; (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or (3) it is information that: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [public disclosure] if: (1) release of the internal record or notation would interfere with law enforcement or prosecution; (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or (3) the internal record or notation: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

You assert that the requested information deals "with a criminal case which has not yet been tried," and that "this investigation has not resulted in conviction or deferred adjudication." We conclude from these statements that there is an ongoing criminal prosecution in this matter, and therefore, we find that release of the information in "Composite Exhibit C" would interfere with the detection, investigation, or prosecution of crime and thus, it is excepted from disclosure under section 552.108(a)(1). *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ ref'd

n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). However, we note that "basic information about an arrested person, an arrest, or a crime" is not excepted from required public disclosure. Gov't Code § 552.108(c). Basic information is the type of information that is considered to be front page offense report information even if this information is not actually located on the front page of the offense report. *See generally Houston Chronicle Publ'g Co., supra*; Open Records Decision No. 127 (1976). Thus, you must release basic information from the documents requested. Further, we note that Composite Exhibit C appears to contain documents that have been filed with a court. Documents filed with a court are generally a matter of public record and may not be withheld from disclosure. Gov't Code § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Thus, you must release the court-filed records in their entirety.

With regard to the submitted information contained in "Composite Exhibit D", consisting of the personnel files of the three officers, we note that generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why section 552.108 is applicable. *See* Gov't Code §§ 552.108, .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Here, you do not explain, nor is it apparent from the face of the documents, how section 552.108 is applicable to the information in the officer's personnel files. Therefore, you may not withhold the information in Composite Exhibit D under section 552.108.

Because the Act prohibits the release of confidential information and because its improper release constitutes a misdemeanor, the attorney general will raise section 552.101 on behalf of a governmental body, although the attorney general ordinarily will not raise other exceptions that a governmental body has failed to claim. *See* Open Records Decision Nos. 455 at 3 (1987), 325 at 1 (1982).

Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision, and incorporates the doctrine of common law privacy. For information to be protected from public disclosure under the common law right of privacy, the information must meet the criteria set out in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's

privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)); see also *Texas State Employees Union v. Texas Dept. of Mental Health and Mental Retardation*, 746 S.W. 2d 203 (Tex. 1987).

Much of the information contained in Composite Exhibit D pertains solely to the work behavior and job performance of the city's police officers, and as such cannot be deemed outside the realm of public interest. See Open Records Decision Nos. 484 (1987) (public's interest in knowing how police departments resolve complaints against police officer ordinarily outweighs officer's privacy interest), 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Consequently, the majority of the information in the officers' personnel files may not be withheld under common law privacy. Further, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *Id.* Therefore, the fact that an employee participates in a group insurance plan funded by a governmental employer and the amount of any payroll deduction therefor is not information that is excepted from disclosure. Open Records Decision No. 600 at 9 (1992). On the other hand, information relating to an employee's choice of insurance carrier and his election of optional coverages is confidential under the right of privacy. *Id.* at 10-11. Similarly, this office has determined that information revealing the personal financial decision to voluntarily have certain deductions made from an employee's paycheck meets the *Industrial Foundation* test. Open Records Decision No. 545 (1990).

This office has also held that information relating to one's credit history meets the common law privacy test. Open Records Decision No. 481 (1987). Additionally, an employee's designation of beneficiary is protected by common law privacy. Open Records Decision No. 600 at 10 (1992). However, neither a public employee's date of birth nor the employee's character references are protected by common law privacy. Open Records Decision No. 455 at 9 (1987).

Additionally, in *United States Department of Justice v. Reporters Committee For Freedom of the Press*, 489 U.S. 749 (1989), the U.S. Supreme Court concluded that where an individual's CHRI is compiled or summarized by a governmental entity, the information takes on a character that implicates the individual's right of privacy in a manner that the same individual records in an uncompiled state do not. Thus, where information in the personnel files identifies the officers as a possible suspect, we conclude you must withhold this information under common law privacy.

Finally, in *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or

physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. We have marked the information in Composite Exhibit D that must be withheld under common law or constitutional privacy.

We next address the various confidentiality provisions applicable to Composite Exhibit D. This exhibit contains medical records, which are subject to section 159.002 of the Occupations Code, known as the Medical Practice Act ("MPA") in conjunction with section 552.101 of the Government Code. As explained above, section 552.101 encompasses confidentiality provisions such as the MPA. The MPA provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). We have marked with blue tags the medical records that appear in the submitted documents. You may release these records only in accordance with the MPA.

Some of the information in Composite Exhibit D is also confidential under section 773.091 of the Health and Safety Code. Section 773.091 provides:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

This confidentiality "does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services." *Id.* § 773.091(g). It does not appear that any of the exceptions to confidentiality set forth in section 773.092 of the Health and Safety Code apply in this instance. Accordingly, the city must withhold EMS records under section 552.101 of the

Government Code, except for information required to be released under section 773.091(g). We have marked this information with a yellow tag.

Composite Exhibit D also contains polygraph examination reports and polygraph results. The release of this information is governed by section 1703.306 of the Occupations Code which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306. This provision prohibits the release of polygraph information to anyone other than those individuals listed in subsection (a). In this instance, the requestor is not among those entitled to access to the polygraph information. We conclude, therefore, that the city must withhold the polygraph information contained in Composite Exhibit D, which we have marked, pursuant to section 552.101 of the Government Code, in conjunction with section 1703.306 of the Occupations Code.

Also included among the submitted documents are accident report forms that appear to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code §550.064 (officer's accident report). The Seventy-fourth Legislature amended section 47 of article 6701d, V.T.C.S. to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413. Further, the Seventy-fourth Legislature also repealed and codified article 6701d as section 550.065 of the

Transportation Code without substantive change. *See* Act of May 1, 1995, 74th Leg., R.S., ch. 165, §§ 24, 25, 1995 Tex. Gen. Laws 1025, 1870-71.¹ In section 13 of Senate Bill 1069, the Seventy-fifth Legislature amended section 550.065 of the Transportation Code to provide for release of accident reports under specific circumstances. Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 13, 1997 Tex. Gen. Laws 4575, 4582-83 (current version at Transp. Code § 550.065). The Seventy-fifth Legislature also repealed section 47 of article 6701d, V.T.C.S. in section 16 of Senate Bill 1069. *Id.* § 16(b), 1997 Tex. Gen. Laws 4575, 4583.

However, a Travis County district court has issued a permanent injunction enjoining the enforcement of the amendment to section 550.065 of the Transportation Code enacted by section 13 of Senate Bill 1069. *Texas Daily Newspaper Ass'n v. Cornyn*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., April 26, 2000). The district court has declared that the law in effect prior to the passage of Senate Bill 1069 now governs and remains unaffected by the permanent injunction. We have determined that the law in effect prior to the passage of Senate Bill 1069 was section 47 of article 6701d, V.T.C.S.²

Section 47(a) of article 6701d provides that:

[e]xcept as provided by Subsection (b) of this section, all accident reports made as required by this Act or Section 4, Texas Motor Vehicle Safety-Responsibility Act (Article 6701h, Vernon's Texas Civil Statutes), and its subsequent amendments, by persons involved in accidents, by garages, or by peace officers shall be without prejudice to the individual so reporting and shall be privileged and for the confidential use of the Department and agencies of the United States, this state, or local governments of this state having use for the records for accident prevention purposes.

¹Because the repeal of a statute by a code does not affect an amendment of the statute by the same legislature which enacted the code, the amendment of section 47 of article 6701d, V.T.C.S. is preserved and given effect as part of the code provision. *See* Gov't Code § 311.031(c). In 1997, the Seventy-fifth Legislature enacted Senate Bill 898 and amended section 550.065 of the Transportation Code to conform to section 47 of article 6701d as enacted by the Seventy-fourth Legislature and repealed article 6701d. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 30.125, 1997 Tex. Gen. Laws 327, 648-49.

² Although the Seventy-fifth Legislature enacted Senate Bill 898 prior to the passage of Senate Bill 1069, Senate Bill 898 was not effective until September 1, 1997. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 33.01, 1997 Tex. Gen. Laws 327, 712. Further, Senate Bill 1069 expressly provides that to the extent of any conflict, Senate Bill 1069 prevails over another Act of the Seventy-fifth Legislature. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 16(c), 1997 Tex. Gen. Laws 4575, 4583. If irreconcilable amendments are enacted at the same session of the legislature, the latest in date prevails. Gov't Code § 311.025(b). Because Senate Bill 898 was never effective and later amendments prevail, we conclude that section 47 of article 6701d, V.T.C.S. was the law in effect prior to the passage of Senate Bill 1069 regarding the availability of accident report information rather than section 550.065 as amended by Senate Bill 898.

V.T.C.S. art. 6701d, § 47(a). *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413.³ Section 47(b)(1) of article 6701d provides that:

The Department or a law enforcement agency employing a peace officer who made an accident report is required to release a copy of the report on request to:

....

(D) a person who provides the Department or the law enforcement agency with two or more of the following:

(i) the date of the accident;

(ii) the name of any person involved in the accident; or

(iii) the specific location of the accident[.]

V.T.C.S. art. 6701d, § 47(b)(1). *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413. In the situation at hand, the requestor has not provided the city with the information necessary for the city to release the submitted accident reports. Thus, the city must withhold the accident reports under section 47(a) of article 6701d, V.T.C.S. in conjunction with section 552.101 of the Government Code. We have marked these reports with a green tag.

The submitted information also contains juvenile crime records. Section 51.14(d) of the Family Code was repealed by the Seventy-fourth Legislature. Act of May 27, 1995, 74th Leg., R.S., 1995 Tex. Gen. Laws 2517, 2590. The Seventy-fourth Legislature replaced the provisions concerning juvenile criminal records with section 58.007 of the Family Code. However, conduct that occurred prior to January 1, 1996, is governed by the law in effect at the time the conduct occurred, and that law is continued in effect for that purpose. *Id.* As the conduct referred to in the submitted juvenile crime records occurred before January 1, 1996, we must determine if section 51.14(d) of the Family Code excepts that information from required public disclosure. Section 51.14(d) provides, in pertinent part:

Except as provided by Article 15.27, Code of Criminal Procedure, and except for files and records relating to a charge for which a child is transferred under Section 54.02 of this code to a criminal court for prosecution, the law-enforcement files and records [concerning a child] are not open to public inspection nor may their contents be disclosed to the public

³We note that the text of amended section 47 of article 6701d is not found in Vernon's Revised Civil Statutes or in the Transportation Code. However, section 47 of article 6701d is published in the 1995 General and Special Laws of the 1995 Legislature at chapter 894, section 1.

It appears that the juvenile crime records do not involve a charge for which a juvenile was transferred under section 54.02 of the Family Code. It is not apparent that any of the provisions allowing inspection of the records apply to the requestor. Additionally, none of the exceptions to section 51.14(d) apply here. We conclude that the city must withhold this information, which we have marked with red tags, under section 51.14(d) of the Family Code.

Section 552.101 also excepts from disclosure criminal history report information ("CHRI"). Criminal history record information generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is made confidential by statute. Title 28, Part 20 of the Code of Federal Regulations governs the release of criminal history record information ("CHRI") which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (the "DPS") maintains, except that the DPS may disseminate such records as provided in chapter 411, subchapter F of the Government Code. *See also* Gov't Code § 411.087 (entities authorized to obtain information from DPS are authorized to obtain similar information from any other criminal justice agency; restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in Chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release the information except as provided by Chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Composite Exhibit D contains criminal history record information that must be withheld under section 552.101 of the Government Code. We have marked this information.

Further, employee W-4 forms are excepted from disclosure by section 6103(a) of title 26 of the United States Code, Open Records Decision No. 600 (1992), and must be withheld under section 552.101.

In addition, section 552.117(2) requires that the city withhold its peace officers' current and former home addresses, telephone numbers, and social security numbers, and information that reveals whether the peace officer has family members, regardless of whether the officer complies with section 552.024. *See* Open Records Decision No. 622 (1994) (former home addresses and telephone numbers of public employees are excepted from required public disclosure under section 552.117). Consequently, the city must withhold this type of information from the personnel files of the three officers for whom information was

requested. We have marked a representative sample of the type of information to be withheld under section 552.117(2)⁴. This information must be withheld anywhere it is found in Composite Exhibit D.

We note that the submitted personnel files contain photographs of the peace officers. Section 552.119 excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. This office has determined that this provision excepts such photographs from disclosure without the need for any specific showing that release of the photograph would endanger the life or safety of the officer. Open Records Decision No. 502 (1988). Therefore, unless the officer consents to the release, you must withhold the photographs of peace officers found in Composite Exhibit D under section 552.119.

We further note that certain information contained in Composite Exhibit D is confidential under section 552.130, which governs the release and use of information obtained from motor vehicle records. Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

....

(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

⁴We note that the documents submitted contain pager numbers, some of which may be excepted from disclosure under section 552.117. In Open Records Decision No. 506 at 5 (1988), this office stated that one purpose of section 552.117 is to protect public officials and employees from being harassed while at home. We thus concluded that *pager numbers* of peace officers, where the pager was purchased and privately owned by the peace officer, may be withheld from disclosure under section 552.117. However, section 552.117 does not except from disclosure *cellular mobile* phone numbers paid for by the governmental body and intended for use at *work* for business purposes. Because the documents at issue do not indicate the type of pager number, we have not marked for redaction any of these numbers. However, if any of the pager numbers for peace officers are privately owned, you must redact this information prior to release of the documents.